Award No. 4486
Docket No. 4448
2-PRR-MA-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Machinists)

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling agreement on August 28, 29, 30, 31 and September 1, 1961, when it failed to apply the provisions of Rule 2-A-5, in the handling of vacancies occurring in machinists' vacancies on those dates.

2. That the Carrier be ordered to compensate Talib Elahee, Machinist, eight (8) hours Grade "E" rate of pay for August 28, 29, 30 and 31, 1961 and Horace Lee, Machinist, eight (8) hours Grade "E" rate of pay for September 1, 1961.

EMPLOYES' STATEMENT OF FACTS: Talib Elahee, machinist and Horace Lee, machinist, hereinafter referred to as the claimants, are employes of the Pennsylvania Railroad Company, hereinafter referred to as the carrier, in the Columbus Shops, Columbus, Ohio, which is a part of the Carrier's Buckeye Region.

On August 28, 29, 30, 31 and September 1, 1961, J. M. Hewitt, held a regular assigned position as machinist, vacation relief, which was advertised in Bulletin No. 1837 and awarded to J. M. Hewitt effective September 29, 1960.

However, on these dates the carrier removed Machinist Hewitt from his regular machinist's assignment and assigned him to the position of gang foreman, which supervisory position is outside the purview of the Machinists' Work Classification. Thus, the carrier created a vacancy in the machinist position of J. M. Hewitt.

In a letter to the machine shop foreman, dated September 11, 1961, the local chairman filed a claim for the specified claimants account of not filling the machinist vacancy of J. M. Hewitt.

The foreman denied the claim, in writing, under date of November 2, 1961.

". . . Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . ."

This provision clearly states that such suits "shall proceed in all respects as other civil suits" with the exception that the findings of this Board as to the stated facts will be accepted as prima facie evidence thereof. It is clear that this provision contemplates the application of the same rule of damages and the same rule against penalties in enforcing contracts as are applied in civil suits generally. An award contrary to these principles would be unenforceable as a matter of law.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said agreement, which constitutes the applicable agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties. To grant the claim of the employes in this case would require the board to disregard the agreement between the parties hereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has shown that the rules agreement was not violated and that, in any event, the claimants are not entitled to the compensation claimed.

Therefore, the carrier respectfully submits that your honorable board should dismiss or deny the claim of the employes in this matter.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Division has several questions before it which it must answer in order to resolve the claims in question. In the first place it must determine

whether a vacancy existed in the Vacation Relief Machinist position, a regularly assigned post, when the incumbent of that position was used to relieve a Machine Shop Gang Foreman while the latter was on vacation; secondly, if it is determined that the post was vacant, did the Carrier have to fill it; and lastly if it had to be filled, did the Carrier err in not filling it with the claimants.

The Division concludes, upon a review of the record, that there was a vacancy created when the Relief Vacation Machinist was used to fill the Gang Foreman's post because the Vacation Relief Machinist was being used to fill a post outside his bargaining unit and which post the machinist had obtained by virtue of his position on the Gang Foreman's seniority roster — a roster distinctly separate from machinist seniority roster. It may well be that the Carrier did not have to fill the Gang Foreman's vacation vacancy, but when it does so with a man occupying a regularly assigned job, the latter job became vacant. Nor is this conclusion vitiated because the outside-the-bargaining-unit vacancy was vacation-caused — this was simply a fortuitous circumstance. What is basic is that a journeyman holding a regularly assigned bulletined job was used to fill a post outside his bargaining unit, and that action created a vacancy in the journeyman's regularly assigned post.

It is true that the Carrier relies upon an oral agreement it made with a former Local Chairman that the vacation relief machinist could be used for other work when there was an insufficient amount of vacation relief work to be done. This oral agreement is now repudiated by the present Local Chairman. The written agreement between the parties does not contain any such provision as the Carrier claims, and the Division is of the opinion, that the Parole Evidence Rule will not permit any of the parties to vary, contradict or alter, by oral agreement, the terms of a written agreement which purports to embody the complete understanding of the parties. Furthermore this Industry is also surrounded by certain statutory requirements which inhibit its ambit of permissible action with regard to making changes in the terms and conditions of a collective agreement. In short, the Carrier relied upon authority, without any doubt in good faith, which is not found within the written agreement. The Division also finds that the Carrier cited Rule 4-J-1 does nothing to uphold its position. All that that rule stands for is that when an employe temporarily fills a supervisory post he must be paid in a certain way. But it is not responsive to the issue as to whether such action creates a vacancy and how the vacancy, if any, must be filled.

The Division having concluded that a vacancy occurred also finds that the vacancy must be filled. Rule 2-A-5 is clear on the point, that except for vacation vacancies, all regularly assigned positions must be filled. The vacation relief machinist post being an advertised and bid-awarded job comes within the mandatory language of 2-A-5 and therefore the Carrier has no choice when it becomes vacant but to fill it in accordance with the terms of Rule 2-A-5.

The Division also believes that the Carrier erred in the way it applied Rule 2-A-5 in filling vacancies. The aforementioned Rule provides that day-to-day vacancies must be filled and will be assigned either by mutual agreement between the Foreman and the designated representative of the Organization, and in the event that no mutual agreement is reached, it must then be filled in accordance with specified procedures set forth in the Rule. The Carrier has laid great stress that the specified procedures would exclude the claimants from consideration for the vacancy. However, the fatal defect

in the Carrier's contention is that it made no use of the first part of the Rule which is predicated upon the parties making a good faith effort to select a replacement for the vacancy by mutual consent. The Carrier candidly admitted no effort was made to select a replacement because it was convinced that there was no vacancy to fill, and therefore there was no need to invoke Rule 2-A-5. The Carrier having proceeded on this premise at its peril, now finds itself in the position of not having proceeded in accordance with the Rule for mandatorily filling vacancies and must be held to have breached the aforesaid Rule. The Division finds nothing in the Rule which on its face would hold that furloughed employes are excluded from being considered by mutual agreement for vacancies in regularly assigned positions.

The Division's finding that Rule 2-A-5 requires the parties to make a bona-fide good faith effort to fill regular vacancies by mutual agreement is consonant with the finding in Award 4428, although it departs from a finding in that Award which held that furloughed employes were excluded per se from consideration for vacancies for regular positions. The Division can distinguish that case from the instant one in that the parties there had at least mutually agreed on one nominee who did not accept the position.

The Division finds that the Award in Arbitration Case No. 262 offers no support to the Carrier. The arbitrator in that case was interpreting a contract provision similar to Rule 2-A-5 but which was different in one very important detail. The contract provision analyzed in the Arbitration Case contained no procedures for filling vacancies by mutual agreement. It merely set forth the procedures which were to be observed in filling vacancies, and the Arbitrator held in that case, that when the Carrier followed those procedures and they did not result in filling the vacancy, there was no further obligation on it to fill the vacancy. In Rule 2-A-5 however, there was an additional requirement on the part of the parties, namely, to try to select the replacement by mutual agreement. This was not done here by the Carrier, and it must therefore assume the burden of having breached the Agreement.

In summary the Division finds that there was a vacancy in a regular assigned position which had to be filled in accordance with the procedure of Rule 2-A-5. The Carrier having, in good faith construed the agreement in such a way to hold that there was no vacancy and therefore did not have to apply the relevant rule, must run the risk incident to its erroneous construction, namely, that its actions breached the Agreement.

The Division also finds that Claimant Elahee was recalled to work on August 29, 1961, consequently cannot be found to have any valid claim on or after that date.

AWARD

Claims sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March, 1964.

DISSENT OF CARRIER MEMBERS TO AWARD No. 4486

The majority finds "that the Carrier erred in the way it applied 2-A-5 in filling vacancies," in that it failed to apply "the first part of the Rule which is predicated upon the parties making a good faith effort to select a replacement for the vacancy by mutual consent."

The Referee's remarks at the adoption session help place the majority award in proper perspective. At that session, in response to a line of questions, he agreed that Claimant's rights (if any there be) were found solely in the opening paragraph of the Rule (the "mutual agreement" paragraph) — without question Claimant lacked standing under any of the numbered sub-paragraphs of Rule 2-A-5. Based on that premise, he then expressed the conclusion that had the Carrier attempted, even though unsuccessfully, to reach mutual agreement as to the method to be followed in filling the alleged "vacancy," the "vacancy" would thereafter have been available only to those groups of employes specifically designated by the numbered sub-paragraphs of Rule 2-A-5 and the instant claim would not have been sustainable.

We heartily agree with the Referee's expressed opinion as to the method to be followed in giving effect to the considered rule but must respectfully dissent from his finding that a "vacancy" requiring application of Rule 2-A-5 did in fact exist.

C. H. Manoogian
F. P. Butler
W. B. Jones
H. K. Hagerman
P. R. Humphreys